

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.590 OF 1989

Smt Hasumati M. Nevale ...Appellant
Vs.
Kalyan Municipal Council ...Respondent

Smt S.A. Dhamale for the Appellant.
Shri A.S. Kumthekar holding for Shri A.S. Rao for
the Respondent.

CORAM : ABHAY S. OKA, J.

DATE : JULY 25, 2006.

JUDGMENT:

1. Heard the Advocates appearing for the parties. The Second Appeal is by unsuccessful Plaintiff. The suit relates to a cabin in which the Appellant is allegedly running a Pan-Bidi Shop. The case of the Appellant-Plaintiff is that in the year 1982, the suit structure has been assessed to the municipal taxes. The suit is filed on the ground that on 08th September, 1982, the officers of the Respondent municipal council threatened to demolish the structure. A declaration is prayed that the suit structure is authorised and the Respondent has no authority to demolish the same without following the due process of law.

2. The suit was contested by the Respondent by

filing written statement on various grounds. It was contended that the suit structure is on road and on a gutter and therefore, without giving notice the Respondent has tried to remove the same by exercising powers under section 179 of the Maharashtra Municipalities Act, 1965. The Trial Court framed various issues. One of the issue was whether the suit structure was legal and authorised. The Trial Court dismissed the suit by holding that the structure was not legal and authorised. The Trial Court held that under section 179(3) of the said Act of 1965, the Respondent Council had a right to remove the suit structure without issuing notice. The Appellate Court has confirmed the said finding.

2. The learned Counsel appearing for the Appellant submitted that a circular has been issued in the year 1972 by the State Government stating that all structures which are assessed to municipal taxes shall be deemed to be authorised structures. She submitted that in any event the Respondent cannot take law in its hand and remove the structure without following the due process of law.

3. I have considered the submissions. In the examination-in-chief, the Appellant has deposed that

the suit structure i.e. the cabin is situated beside a municipal road. In cross-examination the Appellant admitted that the land below the cabin was not belonging to her and she has not taken the same on rent from anybody. She admitted that the municipal council constructed a footpath just touching the suit cabin. She denied that the cabin was on a gutter. However, she admitted that the cabin was on the road side footpath. The witness examined by the Respondent stated that the cabin has been put up partly on gutter and partly on footpath and is causing obstruction to the pedestrians. The Appellant did not contend that the suit cabin was constructed after obtaining building permission. Thus, it is obvious that the construction of the occupant is illegal and unauthorised.

4. Reliance placed on the circular of the State Government which is on page 49 of 'B' File of the Trial Court will not help the Appellant. The said circular itself clarifies that the taxes are collected on the property irrespective of the fact whether the construction is authorised or unauthorised and if the construction is unauthorised, action for removal can be taken. After considering the oral evidence on record, the Trial Court accepted the case made out by

the Respondent that the suit structure is partly constructed on an footpath and partly on a gutter. The said finding of fact is not disturbed by the Appellate Court.

5. The suit is filed for declaration and injunction. It is well settled that the reliefs of declaration and injunction under the Specific Relief Act, 1963 is purely discretionary which are to be granted on equitable considerations. As evidence on record shows that construction of the suit cabin is made unauthorizedly on a footpath and gutter, the Appellant-Plaintiff is not entitled to equitable relief of declaration and injunction.

6. The learned Counsel appearing for the Appellant relied upon decision of the Apex Court in the case reported in **AIR 1986 Supreme Court Cases Page 180 (Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors)**. In paragraph No.57 of the said decision, the Apex Court has held thus:

". To summarise, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or

earmarked for a public purpose like, for example, a garden or a playground that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case;"

The directions given by the Apex Court in the said judgment are in the context of the peculiar problems faced by the city of Bombay. The Appellant who has constructed a cabin unauthorisedly on a footpath is not entitled to discretionary relief of declaration and injunction. There are concurrent findings of fact recorded by the courts below against the Appellant. There is no merit in the Second Appeal and the same is dismissed. No orders as to costs.

JUDGE